

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

DOCKET FILE COPY ORIGINAL

RECEIVED

FEB 15 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j) of the)
Communications Act -- Competitive Bidding)
for Commercial Broadcast and Instructional)
Television Fixed Service Licenses)

MM Docket No. 97-234

Reexamination of the Policy Statement)
on Comparative Broadcast Hearings)

GC Docket No. 95-52

Proposals to Reform the Commission's)
Comparative Hearing Process to Expedite)
the Resolution of Cases)

GEN Docket No. 90-264

To: Chief, Wireless Telecommunications Bureau
Chief, Mass Media Bureau

OPPOSITION TO PETITION FOR DECLARATORY RULING OR WAIVER

GALAXY COMMUNICATIONS, INC.

Barry D. Wood
Stuart W. Nolan, Jr.

WOOD, MAINES & BROWN
CHARTERED
1827 Jefferson Place, N.W.
Washington, D.C. 200367
(202) 293-5333

February 15, 2000

OK4

Executive Summary

Anchor Broadcasting Limited Partnership was the high bidder at auction for a construction permit for a new FM station in Selbyville, Delaware. Now, Anchor wants to defer its payment obligations. Anchor seeks a belated change in the rules under which the auction participants formulated their bidding strategies. Competing applicant Galaxy Communications hereby opposes Anchor's request.

Anchor claims that the pending appeal of competing applicant Susan M. Bechtel (the "Bechtel Litigation") warrants the deferral. However, Anchor filed no comments to that effect in the rulemaking that shaped the FCC's auction procedures. For the Commission to grant the exemption only to Anchor and only now, after the close of the auction (and when Galaxy is no longer able to bid), would be fundamentally unfair.

The Bechtel Litigation is completely different from a petition to deny, which would justify a deferral, because Anchor knew about the Bechtel Litigation before the auction. Moreover, the potential effect of that litigation is not limited to the Selbyville applications. If Bechtel prevails at court, doubt could be cast on permits of other bidders as well.

Even if the Bechtel Litigation were to warrant an exemption from the payment deadline, the exemption logically should have been extended prior to the auction. Anchor, by failing to raise this issue in a timely fashion, should be held to have waived its right to change the rules now.

Accordingly, Anchor's petition should be denied.

TABLE OF CONTENTS

Executive Summary	<i>i</i>
I. Background	2
II. The Requested Declaratory Ruling Is Unwarranted	4
A. The Petition Is Untimely	4
B. Anchor Failed to Serve Galaxy with a Copy of Its Petition	5
C. Anchor Fails to Support Its “Finality” Argument	6
D. A Petition to Deny Is Not Equivalent to Preexisting Appellate Litigation	6
E. Equal Consideration for Similarly Situated Applicants	9
III. A Waiver Is Unwarranted	9
A. Anchor Fails to Show “Special and Unique Circumstances.”	9
B. Anchor Fails to Show That a Waiver Will Serve the Public Interest	10
IV. An Exemption Is Ill-Advised	11
V. Conclusion	12

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 309(j) of the)	MM Docket No. 97-234
Communications Act -- Competitive Bidding)	
for Commercial Broadcast and Instructional)	
Television Fixed Service Licenses)	
)	
Reexamination of the Policy Statement)	GC Docket No. 95-52
on Comparative Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to Expedite)	
the Resolution of Cases)	

To: Chief, Wireless Telecommunications Bureau
Chief, Mass Media Bureau

OPPOSITION TO PETITION FOR DECLARATORY RULING OR WAIVER

Galaxy Communications, Inc. ("Galaxy"), by its attorneys, opposes the petition¹ filed on December 14, 1999, by Anchor Broadcasting Limited Partnership ("Anchor") in the above-captioned proceeding.²

¹ The caption employed by Anchor in its petition suggests that it has requested only a declaratory ruling. However, the text of its petition also requests, in the alternative, a waiver of the rules to achieve a similar effect. *Pet.* at ¶17. Indeed, Anchor's "Certificate of Service" refers to Anchor's pleading as "the foregoing 'petition for waiver.'" Galaxy opposes Anchor's request, no matter whether it is styled as a petition for declaratory ruling or a petition for waiver.

² While Anchor ostensibly filed its petition in three closed rulemaking proceedings, Galaxy submits that the petition cannot properly be considered there. The relief Anchor requests is for Anchor only. See Petition at 1. Thus, it is not germane to rulemaking proceedings of general applicability. The petition should have been filed under the Selbyville comparative caption. Galaxy has kept Anchor's caption on this opposition solely in order to ensure that this opposition will be associated with the original pleading.

Galaxy was never served with a copy of Anchor's petition.³ Nevertheless, Galaxy, Anchor and Susan M. Bechtel ("Bechtel") are the three competing applicants for the construction permit for a new FM station in Selbyville, Delaware (the "Selbyville Permit"). Therefore, Section 1.47 of the Commission's rules required Anchor to serve Galaxy.

In its petition, Anchor seeks a declaratory ruling that would "temporarily exempt" it from payment obligations incurred pursuant to the Commission's Closed Broadcast Auction, or FCC Auction 25 ("Auction 25")⁴. Galaxy hereby opposes Anchor's petition. For the reasons explained below, the timing of Anchor's petition is improper, and the exemption that Anchor seeks is unwarranted.

I. Background

Anchor's discussion of the long history of this matter is incomplete.⁵ Anchor explains that Galaxy, Anchor and Bechtel have contended for the Selbyville Permit for more than 13 years and that Bechtel chose to challenge the Commission's auction proceedings in court (the "Bechtel Litigation") rather than participate in them.⁶ However, Anchor fails to note that it already had two opportunities to invoke the Bechtel Litigation as a basis for deferring

³ Because of Anchor's failure to serve Galaxy, Galaxy did not become aware of the petition in time to file a response within the normal timeframe. Galaxy therefore seeks leave to file this opposition at this time.

⁴ *Pet.* at ¶1.

⁵ *See Pet.* at ¶¶ 4 - 11.

⁶ *Id.* at ¶10.

payment. The Commission's Memorandum Opinion and Order, released on April 20, 1999,⁷ was the product of a process in which the FCC invited comment. Anchor failed to avail itself of the opportunity to submit comment on this issue. Moreover, it filed no petition for reconsideration of the April 20 *Order*. These opportunities are built into FCC rulemaking procedures in order to permit parties to have a voice in shaping the parameters within which they will be expected to operate.

Bechtel declined to submit an "upfront payment." Therefore, Galaxy and Anchor were the only qualified applicants who competed for the Selbyville Permit in the Commission's Closed Broadcast Auction, or FCC Auction 25 ("Auction 25"). At 9 a.m. on October 7, 1999, in round 23 of the auction, Galaxy submitted its final bid of \$191,000, and determined that it would bid no higher. Anchor subsequently submitted the high bid of \$210,000.

Petitions to deny Anchor's long-form application were due to be filed no later than December 13, 1999.⁸ At that time, Galaxy was not in a position to offer evidence that Anchor should be disqualified. Anchor appeared to have emerged as the likely permittee pursuant to the auction procedures. Accordingly, Galaxy did not petition to deny Anchor's application. On December 14, 1999 -- precisely *one day* after petitions to deny Anchor's application for the Selbyville Permit were due -- Anchor filed the instant petition. As

⁷ See *Implementation of Section 309(j) of the Communications Act*, Memorandum Opinion and Order, 14 FCC Rcd 10,030 (1999) ("April 20 *Order*").

⁸ See *Public Notice*, DA 99-2709, "Closed Broadcast Auction Winning Bidder Applications Accepted for Filing Auction No. 25," December 3, 1999.

explained below, the evidence indicates that Anchor's participation in Auction 25 constituted bad faith and that it never intended to honor the strict payment obligation it had incurred.

II. The Requested Declaratory Ruling Is Unwarranted.

A. The Petition Is Untimely. The petitioner suggests that Anchor should not be required to fulfill its payment obligation until after a resolution of the Bechtel Litigation.⁹ Petitioner notes that oral argument in the Bechtel Litigation is not scheduled to begin until late May of this year. Nevertheless, Anchor argues that "in formulating these auction rules, the Commission did not consider a situation" such as that posed by the Bechtel Litigation.¹⁰

If the Commission did not consider this situation, Anchor has only itself to blame. Anchor could have raised the issue, but failed to do so. The Bechtel Litigation can be no surprise to the petitioner. As Anchor admits,¹¹ the Bechtel Litigation began in September of 1998. Yet only now has Anchor come forward with its plea for special consideration -- long after the filing of comments, the promulgation of the auction and payment rules, and the deadline for petitions for reconsideration, to say nothing of the comprehensive Public Notice describing the relevant procedures.¹²

⁹ *Pet.* at ¶10.

¹⁰ *Pet.* at ¶14.

¹¹ *Pet.* at ¶10.

¹² *See Public Notice*, DA 99-1912, "Closed Broadcast Auction," September 17, 1999.

Petitioner was well aware of the Bechtel Litigation prior to the commencement of Auction 25. Anchor nonetheless participated in the auction and represented, in effect, that it intended to honor its bidding commitment without conditions. Only now that the auction has come and gone does Anchor contend that requiring it to render payment on the obligations it has sought and incurred “would be unjust.”¹³

B. Anchor Failed to Serve Galaxy with a Copy of Its Petition. Although petitioner appeals to the Commission’s sense of justice, Anchor has by its own conduct ignored the fundamental tenets of due process, not only by failing to invoke the Bechtel Litigation at an earlier juncture, but by failing to serve Galaxy with a copy of its petition. The suspicious timing of Anchor’s petition is greatly exacerbated by petitioner’s failure to provide service to its only competitor at auction.¹⁴ Anchor’s failure to serve Galaxy constitutes an obvious effort to prevent Galaxy from presenting the other side of this issue. Galaxy is the sole party motivated to call Anchor to account on this score, in that 47 C.F.R. §1.2109(c) provides that upon the disqualification or default status of a high bidder, a license may be offered to the next highest bidder.¹⁵

¹³ *Pet.* at ¶14.

¹⁴ The petitioner’s failure to serve Galaxy cannot be justified by any belief that Galaxy was no longer a party to this proceeding. Anchor admits in its petition that Galaxy “remain[s] involved in this proceeding today.” *Pet.* at ¶4.

¹⁵ Galaxy was the only other bidder in Auction 25 with respect to the instant license.

C. Anchor Fails to Support Its “Finality” Argument. Anchor fails to prove its argument that the ongoing Bechtel Litigation warrants the exemption sought. The only authority cited by Anchor is that Section “1.209(a)” allegedly supports the notion that “bidders should not have to tender payment ... until grant of the application was ‘final’ (i.e., all petitions to deny and other challenges to the application were resolved).”¹⁶

Anchor has erred. No such rule exists.¹⁷ Evidently Anchor intended to cite Section 1.2109(a), although that rule too fails to support Anchor’s position. Rather, it is this rule which Anchor seeks to circumvent. The rule states that “When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default...”¹⁸ The rule clearly stipulates that “*Licenses will be awarded upon the full and timely payment of winning bids and any applicable late fees*” (emphasis added).¹⁹

D. A Petition to Deny Is Not Equivalent to Preexisting Appellate Litigation. As noted above, Anchor insists that the Bechtel Litigation is similar in effect to a petition to deny, so as to justify the exemption that it seeks. However, the key difference is that Anchor already knew about the Bechtel Litigation before the auction took place. Galaxy placed its bid in the

¹⁶ *Id.* at ¶13.

¹⁷ In fact, one fails to find support for Anchor’s argument in the general vicinity. The rule enumerated as 47 C.F.R. §1.209, rather than “1.209(a),” pertains to hearing proceedings (*i.e.*, the identification of the responsible officer in the caption to a pleading).

¹⁸ 47 C.F.R. §1.2109(a).

¹⁹ *Id.*

expectation that it would have to pay promptly upon the conclusion of the auction, absent a petition to deny. The chance that the award of the Permit might be set aside due to the outcome of the Bechtel Litigation was already factored into Galaxy's bidding plans. Obviously, if the Bechtel Litigation were to cause the grant to be set aside, the Commission would refund the applicant's payment. If Galaxy had expected that the payment would not have to be made in the first place until the final result of the Bechtel Litigation is known, it might well have entered a bid superior to that of Anchor.

In contrast, neither party could predict whether a petition to deny the winning bidder's application would be filed. No one could know, in advance of the auction, whether any such petition would likely succeed. Therefore, it stands to reason that the time for paying the full amount of the bid should be postponed while those issues are resolved.

In any event, the "temporary exemption" sought by Anchor is far too open-ended. The Bechtel Litigation is currently governed by the judiciary. The FCC is not equipped to place spectrum governance on hold pending the results of litigation in the courts, where the FCC cannot control the timing of final action. On the other hand, the potential scope of delay posed by a petition to deny is governed by the Commission itself.

A grant of Anchor's exemption request would undermine the integrity of the auction process. Anchor's apparent refusal to pay the amount of its bid (based entirely on information of which it had full knowledge before the auction was held) raises questions as to the sincerity of that bid. In this regard, we note that if Bechtel loses at court, the auction results

will be unaffected, and Anchor will remain the high bidder. In other words, when confronted with a petition to deny, the Commission, at worst, will award the license to the next highest bidder. Anchor is not in a good position to argue that it should not have to follow through on its bid in accordance with the rules because it is unwilling to invest in the Selbyville project until after finality. Anchor effectively waived that argument when it constructed the Selbyville station in advance of finality. It is benefitting from the ongoing operation of the station in the meantime.

If the FCC's actions are overturned in the Bechtel Litigation, the legitimacy of the entire auction will be cast into doubt, but *any* high bidder for any broadcast frequency could make the same argument. Is the Commission prepared to exempt *all* successful bidders from making timely payments merely because Ms. Bechtel has challenged the auction process?

Moreover, a reversal by the court would not mean that Anchor would necessarily cease to operate the Selbyville station. It might still win the permit under whatever selection system the FCC adopts pursuant to the court's mandate. If Anchor did finally lose the right to operate, it would of course be entitled to a refund of the auction payment. In Anchor's "best case" scenario, Bechtel will lose its challenge at court, and Anchor will still owe its full payment to the Commission. Thus, the only conceivable benefit of delay attaches to Anchor if it will not honor its payment obligation because it never intended to do so, or if it cannot because a secret benefactor has withdrawn its support.

E. Equal Consideration for Similarly Situated Applicants. Finally, Anchor argues that the Commission is obliged “to treat all similarly situated applicants in the same manner.”²⁰ This is true. However a grant of Anchor’s petition would ensure that competing applicants will have been treated *unequally*. The timing of Anchor’s petition ensures that only Anchor -- rather than its competitor, Galaxy -- can possibly gain by the ruling it seeks. Certainly, if a special timetable were to be provided to one applicant for the Selbyville Permit because of the Bechtel Litigation, this timetable ought to have been announced *before* Auction 25 so that all of the applicants could have relied on this information when formulating their bidding strategies and bids.

III. A Waiver Is Not Warranted.

A. Anchor Fails to Show “Special and Unique Circumstances.” Petitioner argues in the alternative for a waiver of Commission rules to the same effect as its petition for declaratory ruling: it simply seeks an exemption from the requirement to honor its payment obligation on time. After claiming that the Bechtel Litigation is so nearly identical to a petition to deny as to warrant the declaratory ruling, Anchor asserts that its circumstances are “uncommon, and perhaps even unique.”²¹

As shown above, all of the high bidders in Auction 25 could try to get out of their payment obligations based on the possibility that Bechtel might prevail in her challenge to

²⁰ *Pet.* at ¶15.

²¹ *Pet.* at ¶19.

the auction process. Ms. Bechtel's victory in earlier appeals had, after all, universal repercussions for broadcast applicants.

In any event, Anchor's assertion of "unique circumstances" is not supported by analysis of the cases cited by petitioner.²² The unique circumstances in those cases do not compare to those in Anchor's case. Nor do the cases cited by the petitioner illuminate how Anchor is unique among participants in Auction 25. Many of the participants in Auction 25 undoubtedly would prefer an exemption from the payment obligations they incurred pursuant to the auction. Anchor has failed to demonstrate why it alone should receive, in essence, a free ride.

B. Anchor Fails to Show That a Waiver Will Serve the Public Interest. Anchor claims that an exemption will serve the public interest by "promot[ing] one of the underlying goals of the Commission's auction payment rules."²³ It asserts that it has "every intention" of tendering its payment obligation "once it has received clear title."²⁴ Yet the Commission's auction payment rules specifically state that no applicant will receive clear title, *i.e.*, grant of the license, until after full payment and any applicable late fees are received by the FCC.²⁵

²² See *Pet.* at ¶20.

²³ *Id.*

²⁴ *Pet.* at ¶22.

²⁵ 47 C.F.R. § 1.2109(a).

If Anchor's reference to "clear title" holds any claim to relevance, it is so only by suggesting that Anchor is preparing to sell a license it has not yet received.

IV. An Exemption Is Ill-Advised.

As explained above, the timing of Anchor's petition strongly suggests that petitioner never intended to honor its payment obligation under the FCC's specified timetable. If so, petitioner's "high bid" was merely an illusion employed by Anchor to force Galaxy out of contention for the Selbyville Permit. Anchor's petition indicates that its participation in Auction 25 may have constituted nothing less than a continuous bad faith representation to the Commission.

As the Commission is aware, these are the fledgling months for the use of broadcast auctions as a tool for achieving the public interest. Decisions made now will stand as precedent for the foreseeable future. A grant of Anchor's petition would not only undermine the Commission's auction rules but would promote the proliferation of gamesmanship in the future.

Even if Anchor were not found to have acted in bad faith, the grant of an exemption for Anchor will likely encourage bad faith participation in future auctions. If the Commission condones Anchor's behavior, auction participants will rely on this ruling as a determination that one need not take the FCC's payment rules seriously.

Sufficient evidence already exists to support a determination that Anchor has acted in bad faith. Anchor violated the rules by concealing its petition from Galaxy. Furthermore,

Anchor waited until well after the close of the auction to invoke the Bechtel Litigation as justification for delay in payment. Finally, Anchor waited until the close of the period for filing petitions to deny before seeking exemption from its payment obligation. A denial of the petition is the minimum sanction that should be imposed on Anchor for this conduct.

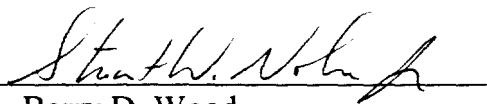
V. Conclusion

In light of the foregoing, it is plain that Anchor's petition was filed far too late, and that the exemption which it seeks is completely unwarranted. Worse, the evidence suggests that Anchor has acted in bad faith, raising questions as to Anchor's qualifications to hold this broadcast license.

Accordingly, Anchor's petition should be denied.

Respectfully submitted,

GALAXY COMMUNICATIONS, INC.

By: 
Barry D. Wood
Stuart W. Nolan, Jr.

WOOD, MAINES & BROWN
CHARTERED
1827 Jefferson Place, N.W.
Washington, D.C. 200367
(202) 293-5333

Its counsel

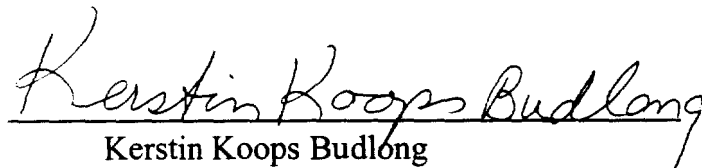
Dated: February 15, 2000

CERTIFICATE OF SERVICE

I, Kerstin Koops Budlong, hereby certify that on this date I caused the foregoing
“Opposition to Petition for Declaratory Ruling or Waiver” to be served by U.S. first class
mail, postage prepaid, on the following:

Thomas A. Hart, Jr.
Scott C. Cinnamon
James E. Morgan
Shook Hardy & Bacon, LLP
600 14th Street, NW, Suite 800
Washington, DC 20005
(Attorneys for Anchor Broadcasting Limited
Partnership)

Gene A. Bechtel
Bechtel & Cole, Chartered
1901 L Street, NW, Suite 250
Washington, DC 20036
(Attorneys for Susan M. Bechtel)


Kerstin Koops Budlong

Dated: February 15, 2000